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No. 85-1683

In The
Supreme Court of the United States
October Term, 1985

CITY OF PHOENIX, a municipal corporation,
Petitioner,

v.

WEST PUBLISHING COMPANY,
a foreign corporation,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Arizona

BRIEF IN OPPOSITION

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FACTS

Other than the residence of a sales solicitor, Arthur Grucky, in the City of Phoenix (hereinafter the "City"), West Publishing Company (hereinafter "West") does not have an office in Phoenix, nor one elsewhere in the State (at times, there has been a sales solicitor living

in Tucson). (TR p. 90; TAH p. 30; TR Exhibit 10).* West does not have a telephone listing in the City of Phoenix as West Publishing Company (TR p. 90), although Mr. Grucky has personally purchased a telephone listing as "representative." (TR p. 9) West has no inventory or warehouse in the City. (TAH p. 25; TR Exhibit 10)

West markets its products by direct mail and through sales solicitation. (TR pp. 86, 113; TAH p. 25; TR Exhibit 10) Direct mail orders are obtained through advertising and customer initiated contacts with West at St. Paul. Solicitation is undertaken by Mr. Grucky, who solicits an order and transmits it to St. Paul for acceptance. Orders have been rejected by West in St. Paul. (TR p. 88) The sales solicitor has no power to bind West. (JPS p. 2, Index No. 59; TR p. 59; TAH p. 26; TR Exhibit 10)

Mr. Grucky was responsible for less than 12.11% of sales into the City of Phoenix. In fact, the 12.11% figure includes certain direct sales (mail order) by West into Phoenix with which Mr. Grucky had no connection. (TR p. 71, l. 18 to p. 72, l. 5) In calculating the agreed 12.11% figure, Mr. Richard Colvin, West tax accountant, actually overstated Mr. Grucky's sales efforts in Phoenix by including all gross revenues derived from individual direct sales in excess of $200.00 from Minnesota to Phoenix. (TR p. 103, ll. 15-21)

If and when an order is accepted, it is shipped or mailed from St. Paul. (TR pp. 59, 78; TAH p. 24; TR Exhibit 10) Mr. Grucky has no connection with product shipping. (TR p. 78) Title to the materials is transferred upon delivery to the carrier. (JPS p. 3, Index No. 59; TR p. 89; TAH pp. 24, 28; TR Exhibit 10) The direct mail

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* JPS—Joint Pretrial Statement; TR—Transcript by Reporter; TAH—Tax Administration Hearing Transcript.

business is conducted solely and exclusively in St. Paul. (TR p. 83)

Mr. Grucky has only one function, that of seeking orders. (TR pp. 88, 113) While he may assist out of interest in customer complaints, such is not his function and complaints are handled in St. Paul by the Customer Service Department. (TR pp. 60, 116; TAH pp. 32, 33; TR Exhibit 10)

Mr. Grucky is an employee of West. (TR p. 54) However, Mr. Grucky arranges and pays his own yellow page advertising and enters and pays for his own telephone listing. (TR pp. 62, 71, 90) Mr. Grucky can be paid a commission on certain direct mail order transactions even if he had nothing to do with the transaction. (TR pp. 65, 72, 114; Exhibit 7, 8; TR p. 62) Mr. Grucky pays all of his personal expenses in soliciting orders. West does not reimburse them. (TR p. 71, ll. 10-17) Mr. Grucky has no involvement in advertising. (TR p. 70) The only evidence of West advertising in Arizona admitted at trial is dated after June 1980.

Although the City makes much of the Arizona Code Commission and its development of the Arizona statutes, it failed to produce any evidence at trial of West's direct involvement with that Commission. As Mr. Grucky testified and as the trial court observed (without objection) (TR p. 68), it was the practicing bar that put the statute plant together. West's contacts with the plant in 1956 were minimal, and the editing and publishing of the Arizona statutes took place in St. Paul.

West was licensed in 1970 by the State of Arizona for use tax purposes. (TR p. 42) Such a tax is a tax on

the customer and is not a tax for the privilege of con .act-ing business. (TR p. 42) The State statutes and Phoenix City Code concerning the use tax are different. (TR p. 51) Section 14-48 of the Phoenix City Code requires that only retailers obtain a license for the use tax. West believed and believes that it is a publisher-manufacturer. West believed that the exemptions in Section 14-50 of the Phoenix City Code applied: (2) —interstate commerce; (6) the sales were made in St. Paul; and (7) in that the periodicals were exempt. West has made a reasonable effort to keep abreast of local tax matters. (TR p. 50)

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ARGUMENT

West requests that the Petition for Certiorari filed by the City be denied for the following reasons, each of which will be discussed in turn:

1. The decision below was supported by an adequate state law basis.

2. The Petition raises no issue of national/federal importance.

3. The lower court's decision is supported by substantial evidence, and the case cited by the City as dispositive is in fact distinguishable.

I. ADEQUATE STATE LAW BASIS SUPPORTS THE DECISION BELOW

Since its initial challenge of the Phoenix city privilege tax assessment, West has maintained that the tax as applied to West violated both the Arizona and Federal Constitutions. West pled the violation of Article II, Section 4 of the State Constitution in its Answer. *See* Appendix C-1, Petition for Certiorari. Moreover, the trial court specifically held:

> "[T]he imposition of privilege license taxes on the defendant, based on the facts of this case, is a violation of the due process clause of the U.S. Constitution and the Arizona Constitution. . . ."

The Arizona Court of Appeals quoted the trial court's finding and affirmed the decision. *City of Phoenix v. West Publishing Co.*, — Ariz. —, 712 P.2d 944 (1985). The Arizona Supreme Court declined to review the matter.

The analysis made by the Arizona courts below conclusively establishes an adequate state law basis for the decision. The City recognizes that the State Constitution was raised in West's pleadings,[1] but tries to avoid the ramifications of the lower court decisions by incorrectly stating that no Arizona court cited the appropriate state constitutional provisions. However, the trial court specifically found the application of the Phoenix privilege tax to West "violated the due process clause of the Arizona Constitution."[2]

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[1] Page 7, Petition for Certiorari.

[2] The Arizona due process clause of the Arizona Constitution, Article II, Section 4, reads: "No person shall be deprived of life, liberty, or property without due process of law."

Further, § 14-2 of the Phoenix City Code provides as follows:

> "There is hereby levied upon persons on account of their business activities within the City . . . privilege taxes . . ."

Arizona Courts have rendered a decision determining that a local ordinance does not apply to West Publishing Company. It is a decision on a narrow subject of local interest only.

This Court has a long established policy of deferring Federal constitutional questions when a challenged decision may properly rest on state grounds. As long ago as 1935, Justice Brandeis succinctly noted:

> "The court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Appeals from the highest court of a state challenging its decision of a question under the Federal constitution are frequently dismissed because the judgment can be sustained on an independent state ground." Concurring Opinion of Justice Brandeis, *Ashwander v. Valley Authority*, 297 U.S. 288, 56 S.Ct. 588, 80 L.Ed. 688.

In *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the Court held that jurisdiction failed where the state court judgment was supported by adequate state grounds.

It is axiomatic that state courts are the final interpreters of state constitutional law. This is simply judicial recognition of the separation of powers doctrine, as stated most clearly in *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 89 L.Ed.2d 789 (1944):

> "This Court from the time of its foundation has adhered to the principle that it will not review judg-

ments of state courts that rest on adequate and independent state grounds. . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." (citations omitted)

The City offers no explanation as to why Arizona courts are not free to base their decision on state constitutional grounds. Nor does the City allege that the lower courts' interpretation of the Arizona due process clause conflicts with the Federal Constitution.[3] Instead, the City incorrectly argues that no Arizona court considered the State Constitution, or alternatively that the decision rendered was in no way based upon state constitutional grounds. However, the above principles apply even if it could be asserted that no Arizona court *expressly* based the decision on state constitutional law: "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested on a non-federal ground, this court will not take jurisdiction to review the judgment." *Durley v. Mayo*, 351 U.S. 277, 76 S.Ct. 806, 100 L.Ed. 1178 (1956) (emphasis in original).

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[3] State courts are empowered to provide greater protection to an individual under the State Constitution than might be afforded by the Federal Constitution. *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975). *See also State v. Opperman*, 247 N.W.2d 673, 675 (S.D. 1976).

II. THIS CASE PRESENTS NO ISSUE OF NATIONAL IMPORTANCE

This Court may decline to grant certiorari when the issues raised in the Petition are not of national importance.

The present Petition is one in which no issue of national significance is raised. The petition simply represents the dissatisfaction of a local government with an adverse decision rendered by its own state courts. This is not a situation in which a state seeks to improperly *impose* a tax on activities protected by the United States Constitution or other federal law basis. The Arizona Court of Appeals did not extend the City's taxing authority so as to include constitutionally protected areas. Instead, the decision in this case *restricts* the extent of the City's ability to tax intrastate and interstate commerce. This court rarely grants a state's petition for certiorari to review judgments rendered by state courts in favor of their citizens. *See, Michigan v. Long,* 463 U.S. 1032, 1069, 103 S.Ct. 3469, 3491, 77 L.Ed.2d 1201, 1233 (1983) (Stevens, J. dissenting). Various other Justices have expressed the concept in dissents,

> "I continue to believe the justifications for review in the Court are at their weakest in such cases where no individual rights are alleged to be violated and where a state court speaks to its own institutions." *See, Ponte v. Real,* 471 U.S. —, 105 S.Ct. 2192, 2209, 85 L.Ed.2d 553, 575 (1985) (Marshall, J. dissenting).

See also, Boag v. MacDougall, 454 U.S. 364, 367-368, 102 S.Ct. 700, 702, 70 L.Ed.2d 551 (1982) (Rehnquist, J. dissenting). In *Rudolph v. U.S.,* 370 U.S. 269, 82 S.Ct. 1277, 8 L.Ed.2d 484 (1962) this court held that certiorari was

improvidently granted where the action to recover income taxes involved factual issues and the decisions would be of no importance save to the parties. Assuming, *arguendo*, this issue was incorrectly decided, the consequence is of no national importance at all. The legal principles have been clearly enunciated in the cases set forth in part III, *infra*. At most, the State of Arizona deprived itself, or its political subdivisions, of revenue which it might have otherwise collected from intrastate and interstate commerce.

Moreover, even the implications of the decision on Arizona law may be limited for the determination of whether there exists sufficient constitutional nexus for taxing purposes necessarily turns upon the facts and circumstances surrounding each case.

III. THE LOWER COURT PROPERLY FOUND SUBSTANTIAL NEXUS TO BE LACKING

The trial court found that West's only contact with the City of Phoenix arose by virtue of the fact that one of West's salesman, Arthur Grucky, independently chose to live within the City of Phoenix.[4] The Arizona Court of Appeals observed that West markets the bulk of its products by direct mail conducted solely and exclusively in Minnesota; that West does not own or lease an office or other facility in Arizona; and that West does not maintain any inventory in Arizona. The Court of Appeals further found that West's only "presence" in Phoenix was attributed to a single salesman, who performed only one function—seeking orders and answering questions relative to West products. It was stipulated by the parties

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[4] West did not require Grucky to live in Phoenix.

that the salesman's activities within Phoenix comprised less than twelve percent of West's gross revenue in the City, and that the balance of the transactions were conducted by direct mail between West and its subscribers.

Based upon these particular facts, the court held that "the nature and quantity of West's activity in the City of Phoenix, as above described, are not sufficient to provide the requisite constitutional nexus for the tax sought to be imposed." *See* Appendix, page A-6, Petition for Certiorari. This finding was clearly based on substantial evidence submitted to the trial court.

Contrary to the City's assertions, the decisions rendered by the trial court and the Court of Appeals are not "flatly and absolutely contrary to the decision of this Court in *Standard Pressed Steel Co. v. State of Washington,* 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975)". Page 7, Petition for Certiorari. Instead, the facts in that case are distinguishable from those at bar, and *Standard Pressed Steel* does not require reversal of the decision in this case.

In *Standard Pressed Steel,* Boeing was the taxpayer's primary if not only customer. Standard relied on its employee in Washington to conduct *all* elements of the business relationship with Boeing, including substantial engineering activities. Moreover, the employee was paid a salary to perform these ancillary services for Boeing, demonstrating the import attached to the activities by the taxpayer.

The *Standard Pressed Steel* court cited findings of the Washington State Board of Tax Appeals below and found

that the activities of the employee were *necessary* to Standard in making Boeing aware of which products Boeing might use, in obtaining engineering designs from Boeing, in securing testing of samples from Boeing, and in resolving Boeing's problems. Put differently, the employee's activities were required to maintain the realization and continuance of the taxpayer's relationship in Washington with Boeing. This Court ruled that the employee "made possible" taxpayer's relationship with Boeing in the State, and therefore a substantial nexus had been established between taxpayer and the State of Washington to justify the imposition of a State *use* tax on revenues derived from Boeing.

The facts, as well as the tax itself, are readily distinguishable in the present action. Unlike the principal customer in *Standard Pressed Steel,* all of Mr. Grucky's contacts with West customers together comprised less than twelve percent of West's total revenue in Phoenix. Moreover, Mr. Grucky's activities were not required to maintain West's business relationship with its customers. Further, the privilege tax is imposed on West and not imposed upon its customers as a use tax. The City initially sought to collect this tax on all of West's sales into the City of Phoenix together with fifty percent of West's sales allocated to Mr. Grucky even though made outside the City. (TR 102)[5] Finally, this tax is imposed upon direct sales with which Mr. Grucky had no connection.

The fact that Mr. Grucky solicited sales from customers did not "make possible" *West's* business in Phoenix.

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[5] The City abandons the out-of-city aspects of this tax in its brief to the Arizona Court of Appeals.

Itinerate drummers and traveling salesmen do not conduct activities sufficient to establish a substantial nexus for tax purposes. *Norton Co. v. Ill. Dept. of Rev.,* 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed. 517 (1951); *McLeod v. Dilworth,* 322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944); *West Points Wholesale Grocery Co. v. City of Opelika, Alabama,* 354 U.S. 390, 77 S.Ct. 1096, 1 L.Ed.2d 1420 (1957); *Memphis Steam Laundry Cleaner v. Stone,* 342 U.S. 389, 72 S.Ct. 424, 96 L.Ed. 436 (1951). Imposing a tax on such an event would mean that a taxpayer's "slightest presence" establishes a nexus, a position which was expressly rejected by this Court in *National Geographic Society v. Calif. Board of Equalization,* 430 U.S. 553, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1966). The proper inquiry under *Standard Pressed Steel,* is whether such activities are so *numerous* that it can be fairly said that the taxpayer's business relationships in state are made possible by its employees; or whether the *nature* of the employee's activities as a whole are such that without them, the taxpayer's business relations in the jurisdiction would be substantially impaired. As the trial court necessarily found, Mr. Grucky's activiites are not so numerous as to "make possible" West's business relations in Phoenix.

The City has steadfastly urged that every attorney in Phoenix must have certain West publications in order to effectively practice law. Nowhere did the City prove that Mr. Grucky's activities in Phoenix were required or necessary for West to obtain that business. There is nothing in the record to suggest that those Phoenicians who dealt with West directly did so primarily because of Mr. Grucky and his activities in Phoenix. Indeed, had West chosen to keep Mr. Grucky in Minnesota, one may assume that ad-

vertisements as to the availability of West's publications and services would have still reached Phoenix customers. There is no evidence that because Mr. Grucky chose to live in Phoenix instead of elsewhere that the nature of his activities changed from that of a drummer to someone who "makes possible" West's business relationships. Moreover, the City offers nothing to demonstrate it was necessary or even beneficial for West to have Mr. Grucky located in Phoenix in order to procure Phoenix sales. In finding for West, the trial court correctly observed:

> "The court finds that the City of Phoenix' only contact with West is the fact that Mr. Grucky has chosen to locate his home in the City of Phoenix; that during the years he was covering the entire state, he could have just as well chosen to live in Scottsdale, Mesa, or in an unincorporated portion of Maricopa County."

In sum, the determinative factors in *Standard Pressed Steel* which supported imposition of the State tax are not present here. Rather, the Arizona courts determined that insufficient nexus existed to justify imposition of the tax, and this determination is supported by the findings of fact made by the trial court below.

RESPECTFULLY SUBMITTED this 28th day of May, 1986.

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